No. 15,082

United States Court of Appeals

For the Ninth Circuit

CITY OF ANCHORAGE, a Corporation,
Appellant,

vs.

RICHARDSON VISTA CORPORATION and
PANORAMIC VIEW CORPORATION,
Appellees.

Appeal from the District Court for the District of Alaska, Third Division.

BRIEF FOR APPELLEE RICHARDSON VISTA CORPORATION.

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PRELIMINARY STATEMENT.

Statement of facts, as restated by appellee Panoramic View Corporation, is substantially correct, noting, however, that no public hearing, as described by appellant on page 6 of its brief, was held by the City Council, and that instead, appellees merely appeared at a regular council meeting to discuss their grievance, which was set forth in a letter addressed to the Mayor and City Council dated November 9, 1951, two days prior to the regular council meeting. (Exhibit 1.)

ESSENTIAL UNCONTROVERTED FACTS.

Appellees are owners of nineteen (19) buildings located on one tract of unsubdivided land in the City of Anchorage, leased for a long term by Richardson Vista Corporation from the United States Army, and fourteen (14) buildings located on another tract of unsubdivided land in the City of Anchorage, leased by Panoramic View Corporation for a long term from the United States Government, Department of the Interior. The tracts abut one another.

On each tract is built a commercial establishment consisting of garden court type apartment buildings that are managed by a single business entity. The buildings are uniformly used for apartment dwellings, under uniform leases, with common maintenance and supervision. For property tax purposes, each appellee's tract is treated by the City of Anchorage as a unit; the city likewise treats each tract as a separate establishment in requiring but one utility payment bond from each appellee corporation, not 19 and 14 bonds. (R. 150, 178.)

The appellees' buildings were erected pursuant to regulations of the Federal Housing Administration, and appellees' loans and mortgages were insured by Federal National Mortgage Association.

Appellees' buildings are separated in order to provide light, air and lawns around the apartment units and to avoid a mechanical, uniform outlook; appellees, in financing their project, each entered into a single mortgage as to its separate interest, covering the entire plat and real estate upon which all of each

appellee's buildings are located; the two projects are strikingly similar, almost identical, to the Colonial Gardens project described hereafter in this brief on pages 3 and 4.

Appellees' buildings were occupied in 1951.

Appellees provide "house current" for the projects, that is, electricity for halls, entries, laundry rooms, outside floodlights; each tenant provides for his own consumption of electricity in his apartment, and each tenant is separately metered for this consumption. We are not concerned with this tenant usage of electric current in this case.

Appellant city had absolutely *no* rules, regulations or ordinances governing the sale of its electrical energy other than the tariff schedule called Schedule "C", published periodically in its telephone books (at R. 361 counsel for appellant states: "* * * it puts the utility company in a situation as having operated completely without any ordinance as to the matters in essential dispute in this action").

Schedule C was entitled *"commercial* rate" and was "applicable to * * * *establishments* not classed as single family residences" and provided a diminishing sliding scale of rates based on volume of consumption. (R. 47.)

Prior to August, 1949, the appellant City of Anchorage had a 29-year-old ordinance, number 55, regulating electrical installations where more than one building was located on one tract of land owned by one customer; this ordinance was repealed in

August of 1949, and Schedule C enacted as the sole and only rate schedule and rate regulatory ordinance of appellant; no other regulations pertaining to electric rates were ever enacted by appellant during the period of time with which this case is concerned.

Appellees were clearly governed by the unambiguous provisions of Schedule C, because each appellee consisted of *one commercial establishment;* each of appellees, before becoming electrical consumers of the City of Anchorage were led to believe that each of them would be treated as one customer of the City of Anchorage; when appellees received their first billing from appellant for electrical consumption, they found that each of appellee's buildings was treated as a separate customer for rate purposes; this matter was protested orally, and in writing, to the governing body of appellant, but appellees were not classified under the provisions of Schedule C, because the City Council erroneously believed that the electrical safety code prevented the granting of appellees' request, or perhaps because that body failed to study the request in the light of its Schedule C, or because that body refused to believe its Ordinance 55 had been repealed two years before.

From the date of their first payment for electrical services furnished by appellant city, each of appellees formally protested each monthly payment in writing, and made every payment for electrical services under written letter of protest. (Exhibit 1; R. 176.)

Appellees promptly brought this proceeding to enjoin appellant from charging each of appellees the

erroneous rate in the manner aforedescribed, and for an order compelling the appellant city to apply the commercial rate, as set out in Schedule C, to each of appellees' total consumption, and to be ordered to desist from charging each of appellees' buildings as if each building were a separate consumer of appellant, and, further, that the appellant city be ordered to repay overcharges to each of appellees. (R. 10, 11.)

The United States District Court for the District of Alaska, in written opinion, held that the appellees' housing projects fell squarely within the meaning of Schedule C, and that appellees were each entitled to the benefits of the sliding scale of rates, i.e., the "lower rates for increased consumption".

POINT ONE.

SIMPLE MATTER OF TARIFF CONSTRUCTION.

Simple Logic Compelled the Conclusion Reached by the Trial Court.

The only reasonable construction of the city's published tariff, Schedule C (Exhibit A), after the repeal of Ordinance 55 in August of 1949, requires a single billing for the total "house current" used in each commercial establishment of each of appellees. Each building was thus erroneously treated as a separate customer.

Some of the many reasons for recovery under Point One above are as follows:

A. The tariff applicable to appellees' electrical usage was Schedule C (Exhibit A); this was in effect without change during the period 1951 to 1954, inclusive; appellees fell squarely into the classification therein created; each of appellees was a commercial establishment—the tariff was clear.

(1) The law is settled that such tariffs are most strictly construed in favor of the customer and against the utility company—in this case the city.

(2) There is no question but that appellees were each engaged in commercial activity.

(3) Although appellees' apartments are built in many buildings, they are one establishment (*Chrysler Corporation v. Smith, et al.,* Michigan Supreme Court, 1941, 298 North Western 87; *Spielman v. Industrial Commission, et al.,* Wisconsin Supreme Court, 1940, 295 North Western 1; *Philadelphia Suburban Water Co. v. Pennsylvania Public Utility Commission,* 64 Atlantic 2d 500, Pennsylvania Superior Court, 1949; see also *Ford Motor Co. v. New Jersey Department of Labor and Industry,* 71 Atlantic 2d 727, 730, where the "establishment" cases are collected and analyzed.)

(a) In the *Chrysler* case, above cited, or 298 North Western 87, various co-ordinated plants within eleven miles of the Dodge main plant, synchronized and employed by a corporation in the Detroit area in the accomplishment of a common end, namely, the manufacture of automobiles, constituted a single "establishment" within provisions of Michigan Unemployment Compensation Act, and in the *Spielman* case,

295 North Western 1, under a similar Wisconsin Unemployment Compensation Act, two plants, 40 miles apart, that were synchronized and co-ordinated, were held to be a single establishment for the manufacture of automobiles "as they would have been had they been in two buildings adjacent to each other".

(b) Appellees used as a basis of their complaint *Philadelphia Water Co. v. Pennsylvania Public Water Commission,* decided March 15, 1949 and reported in 64 A. 2d 500, and in which the Philadelphia Suburban Water Company, or "water company", was ordered by the Public Utility Commission to provide single-point water meter service to the Colonial Gardens Corporation at its eleven-building apartment development in Delaware County, Pennsylvania. The water company appealed the commission's decision and Colonial intervened.

The Colonial project was financed by F.H.A. in 1940 and consisted of eleven two-story buildings comprising 186 apartments. They were arranged into buildings of various sizes in order to avoid monotonous uniformity. All were erected on a single plot of ground owned by Colonial through which a private road was cut for the convenience of the tenants. The mortgage under which the project was financed covered the entire plot and all eleven buildings. The project was taxed as a single unit by the local real estate taxing bodies, had a single superintendent and was supplied with gas and electricity under single-point meter service by the utilities providing those services. The vice president of the corporation testi-

fied that the project differed from a single apartment house only in that the apartment units were grouped in separated buildings of varying sizes and that this separation was to provide light and air and grass around the dwellings and to avoid a "mechanical uniform outlook".

The Court held that the development was a single establishment as the consumer was the corporation rather than the tenants. The tariff made use of the same two words as the Anchorage electrical tariff, namely, "commercial" and "establishment".

The Court cited cases to support this contention.

The Court further held, at page 503 of 64 A. 2d, as follows:

> "Further, the evidence supports the finding here assailed; the testimony of Colonial's vice president is adequate to establish that there was a uniform use of the property for apartment dwellings, with uniform leases in which all utility services were covered by the rent, with common maintenance and supervision, common garage facilities, on a single tract mortgaged as a unit, taxed as a unit, and billed for utility services as a unit. Such a factual situation, under the decisions of this Court, establishes a case where single-point service is proper."

The *Land Title Bank & Trust Co. v. Pennsylvania Public Utility Commission* case, 10 A. 2d 843, which case is curiously cited by appellant at page 26 of its brief (note appellant's avoidance of pointing out the following distinguishing fact in its brief), was dis-

tinguished at page 503 on the grounds that in that case there was a diversity of ownership which precluded classification as a wholesale consumer and that "Combination of the various individual consumers in that case was not permitted; *in this case, of course, there is but one owner—Colonial—and but one consumer—Colonial.*" (Italics supplied.)

The Court stated at page 504:

> "* * * *the coincidence of uniform ownership with uniform use of the premises places Colonial in the category of a single commercial consumer* * * *" (Italics supplied.)

and upheld, under a tariff similar to that of appellant city, the decision of the commission.

B. Our case cannot be distinguished from the Pennsylvania case cited above, the *Colonial* case, 64 Atlantic 2d 500, where identical utility customers were treated as one customer and where the Court held that any application, other than one application of the rate, was improper.

(1) Appellees had identical construction consisting of many buildings under F.H.A. planning; appellees each had a blanket mortgage; appellees' tracts were not subdivided and were taxed as single units, etc.

(2) The striking and classical analogy, well known to jurists and physicists, between water and electricity, is again forcefully illustrated by the facts of this case. The clear, cold logic of the Pennsylvania case governs this situation.

C. Appellant owed the duty and obligation to appellees to inform them of the most favorable rate applicable to their type of consumption and to apply that rate.

(1) This principle is merely common sense and applied clearly to a city acting in a proprietary nongovernmental capacity, such as appellant in its relation to appellees.

(2) Appellees offered to bear the added expense, if any, of whatever distribution system was required to make power available at the most favorable rate—i.e., one application of the commercial rate; and even offered to pay for line and transformer losses in accordance with the established electrical engineering practices—all to no avail. (R. 175, 343, 344.) Appellees' evidence in this respect is not controverted. Subsequent evidence showed that no additional expense *was* required, but that the distribution system as designed and built was actually the most appropriate. (R. 285 et seq., R. 404.)

(3) Appellees had no duty under the "most favorable rate" principle to make the offer referred to in the subparagraph immediately preceding. This tariff analysis should have been made by the utility company, but despite appellees' gratuitous offer, appellees were denied the rate to which they were entitled.

(4) The city failed to distinguish between the two problems that confront any utility company: that of *delivering* the service to the customer, and that of *metering* the consumption. (R. 284.)

D. Apparently appellant believed that Ordinance 55, passed and approved by the City of Anchorage thirty-odd years ago, was still in effect. Counsel for appellant: "I am surprised by the fact it was repealed, actually." (R. 360.)

(1) Ordinance 55 incorporated the National Electrical Code, by reference, in its first seven (7) sections. When appellant frequently stated to appellees that the national code forbade thee installations sought (again uncontroverted testimony), appellant must have referred to Ordinance 55. (Incidentally, the national code did not prevent the installation sought, and appellant abandoned this position at the trial.) (R. 402.)

(2) Appellant, during the early stages of the trial, insisted that Ordinance 55 was still in effect, and appellant was confused and amazed when it was proved, at the close of appellees' case, that Ordinance 55 had been repealed in August of 1949. Counsel for appellant: "Frankly, this comes as quite a surprise to me because of the fact that I had no knowledge * * * *" (R. 359.)

There had been a profound change in city administration after the filing of pleadings herein, and it is not unreasonable that the new personnel—new city manager, new attorney, new electrical superintendent—were not aware of past city history, and lacked accurate knowledge of city ordinances.

(3) Appellant's illogical and inexplicable attitude toward appellees becomes clear when it is realized

that it was predicted on a mistaken belief, inherited from prior city officials, that Ordinance 55 was in force. Counsel for appellant, before the first testi-testimony was adduced: "* * * I know that there will be an argument as to its repeal and whether or not it is still effective." (R. 128.)

(4) The first seven sections of Ordinance 55 were preserved because the principle therein contained—i.e., adoption of national code—was later incorporated in Chapter 10 of the Anchorage General Code; the remaining twenty-two (22) sections were repealed (Sections 7 to 29, inclusive) because these matters properly belonged, and were later inserted after deleting provisions the City Council no longer wanted, where the City Council desired that they should be retained, in Article 6, entitled "Electrical Distribution" of Chapter 3 of the Anchorage General Code entitled "Public Works and Utilities". Chapter 3 of the Anchorage General Code provided that the city could make rules and regulations governing the rendition of service, and it is noteworthy that *no regulation was ever adopted prohibiting combined billing of single customers or requiring separate billing where separate meters were installed,* such as the old Ordinance 55 had provided.

(5) The city's expert witness himself admitted that he had never run across a similar situation—i.e., where the utility company had no rules, regulations, but based its electrical distribution upon such a skimpy set of regulations as that appearing in the telephone directory. (R. 420.) To follow the city's

contentions would permit it to improvise after the fact retroactive conditions for the application of its rates for electrical service.

(6) The rates, or combined billing, sought by appellees were not precluded by any portion of the National Electric Safety Code; appellant offered no proof to this effect and abandoned the city's prior position in this regard.

POINT TWO.

OTHER REASONS EXISTED FOR DECISION.

Other Grounds Existed Which Justified Decision for Appellees; The Trial Court Could Also Have Correctly Decided the Case on These Grounds.

Appellees relied, to their detriment, upon the city's statement of its interpretation of the rate schedule. (R. 164, 190, 191, 203, 345, and much other evidence.)

Appellees could have installed their own electrical generators. Their boiler house was designed, with this in view, for twice the capacity needed in supplying heat to their establishments. One of their officers went to Whittier, Alaska, to discover the whereabouts and negotiate the purchase of surplus generators on the Aleutian Islands.

The city, fearing competition as an electrical supplier from other electrical suppliers in the vicinity, assured appellees among other things that it would treat each appellee as one customer with respect to electrical rates. No other similar establishment existed in or near the City of Anchorage at that time.

Appellees relied upon the city's assurances, abandoned their plans to install their own generators, permitted the city to connect each establishment to the city's distribution system, complied with its instructions regarding the number of meters, constructing each establishment and its many buildings for separate service drops (which method of installation is the best from an engineering standpoint whether each corporation is a customer or each building a customer (R. 286, 288, where appellant stipulates it is the cheapest and the most economical method)), permitted the apartments to be occupied, and made immediate complaint when the city after several months' tardiness finally sent its first billing for house current as if each apartment building were a separate establishment instead of a part of an integrated whole.

The then city manager of Anchorage, Robert Sharp, was not called as a witness by the appellant to refute any of appellees' testimony, nor was the failure to call Sharp explained by the appellant.

POINT THREE.

NONEXISTENT "POLICY" WILL NOT DISPLACE TARIFF.

"Policy" Will Not Justify Overcharges.

Nor can the city stand on its desperate and tenuous position that it had some sort of "policy" justifying its overcharges. Any policy shown rested upon the situation as it was long before the repeal of Ordinance 55, which required separate billings for separate meters; it was not shown what, if any, tariff

existed at that time. In any event, policy is a proper subject for consideration only where it is clearly apparent and only where a law or tariff of doubtful meaning or application is being construed. (50 Am. Jur., p. 279.)

> "The supposed policy of a state cannot, in a judicial tribunal, prevail over the plain language of a statute. A Court is not free, in construing a statute, to substitute its own ideas as to the policy of the law, and where plain and unambiguous words or phrases are employed by the legislature they are not to be restricted in their operation by reference to a policy of the law not indicated in the statute. Such a rule applies to the policy of the common law which cannot restrict the operation of a statute expressly covering the subject. Considerations of policy are entitled to weight in the construction of statutes only in cases of doubtful interpretation, and where the meaning and intention of the legislature appear to be opposed to the literal import of the language of the act." (50 Am. Jur., p. 281.)

All the experts' testimony was to the effect that appellees' establishments had been wired in the most economical and feasible method (R. 286, 288, by stipulation), namely, with a separate service drop to each building, since the apartments were spread out in a series of two-story structures with playgrounds and lawns between them, instead of being housed under one roof many stories high. Because this feasible and practical method was used to *deliver* the electricity, appellant has sought to penalize appellees by using a method to *meter* the electricity different from that used with its other apartment house customers.

CONCLUSION.

This is an extraordinarily clear case in that a clearly worded tariff governing electrical utility rates was ignored by appellant. The appellees fell precisely into the classification created by the tariff (Schedule C) and were entitled to the rate prescribed in the tariff.

The trial Court was correct in so holding, and in following the precedent of the *Colonial* case, above cited, namely, "the coincidence of uniform ownership, with uniform use of the premises, places appellants in the category of a single commercial customer".

Appellant's talk of "disastrous consequences" is entirely unsupported by the record. (Appellant's Brief, p. 56.) Far from being disastrous, appellant obviously has a very lucrative business in connection with these two projects. It collects upon a separately metered, nongraduating basis from each of 418 families at Richardson Vista and from each of 264 families at Panoramic View (R. 4) with little of the normal expense incurred by utility companies in servicing such a concentration of power purchasers.

Even if appellant's talk of disastrous consequences were supported by the record, and of course it is not, it has no bearing on the issues. Likewise, the other arguments of appellant are based on premises that are unsupported by the record, i.e., talk of discrimination where the trial Court's decision did not rest on discriminatory practices, i.e., talk of tariffs which are entirely different from the tariff or rate schedule here presented. This verbose arguing on appellant's

part is indicative of the weakness of its position and its so-called arguments or points are in reality desperately spawned red herrings.

The decision of the trial Court must be affirmed.

Dated, Anchorage, Alaska,
August 20, 1956.

Respectfully submitted,
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